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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 148

OWENS GENERATOR COMPANY, INC., a defunct New Jersey corporation; FREDERICK H. WITTMER, individually and as Director and Statutory Liquidating Trustee of Owens Generator Company, Inc., a defunct New Jersey corporation; and FILLMORE S. GIBSON, Executor of the Estate of William J. Tobin, individually and as a Director and Statutory Liquidating Trustee of Owens Generator Company, Inc., a defunct New Jersey corporation,

Petitioners,

vs.

H. J. HEINZ COMPANY, a Pennsylvania corporation,

Respondent.

Petition for the Writ of Certiorari

to the United States Court of Appeals
for the Ninth Circuit

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OWENS GENERATOR COMPANY, INC., a defunct New Jersey corporation; FREDERICK H. WITTMER, individually and as Director and Statutory Liquidating Trustee of Owens Generator Company, Inc., a defunct New Jersey corporation; and FILLMORE S. GIBSON, Executor of the Estate of William J. Tobin, individually and as a Director and Statutory Liquidating Trustee of Owens Generator Company, Inc., a defunct New Jersey corporation,

Petitioners,

vs.

H. J. HEINZ COMPANY, a Pennsylvania corporation,

Respondent.

Petition for the Writ of Certiorari

to the United States Court of Appeals for the Ninth Circuit

Most respectfully, petitioners pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 23, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A-1, as amended by its order denying a petition for rehearing, printed in Appendix A-4, is reported in 314 F.2d 66. The opinion of the

District Court (Tr. 307-315), printed in Appendix C, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1963 (printed Appendix A-2). A petition for rehearing, filed February 18, 1963 (printed Appendix A-3), was denied on February 21, 1963 (printed opinion, Appendix A-4). Jurisdiction of this Court is invoked under U.S. Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED

1. Where a state court decree has awarded a perpetual injunction to two co-plaintiffs, may a federal court in subsequent proceedings brought to enforce that decree on behalf of one of the co-plaintiffs look behind that decree and conclude that this one of the co-plaintiffs should never have had the benefit of the decree in the first place?

2. Does a federal court give full faith and credit to a state court decree when the federal court remodels that decree without reference to the law or usage of the state in which the decree was entered?

STATUTORY PROVISIONS INVOLVED

The questions relate to U.S. Code, Title 28, Section 1738, and to the California Code of Civil Procedure, Sections 378 and 1908, printed in Appendix D.

STATEMENT OF THE CASE

Petitioners,[1] on June 18, 1957, filed the present action against respondent, H. J. Heinz Company (hereinafter usually called

1. Petitioner Owens Generator Company (hereinafter usually called the corporation), did not pay its 1940 New Jersey state franchise taxes; on November 25, 1941, it was enjoined from conducting business by the Chancery Court of New Jersey; and on January 19, 1948, it was deprived of its charter by proclamation of the Governor for non-payment of such franchise taxes. Ever since that date, it has been incapable of conducting, transacting or being in business (Heinz answer, paragraph 16, Tr. 148-149). By operation of law, its directors, Charles H. Owens, Frederick H. Wittiner and William J. Tobin, became statutory trustees for the corporation (New Jersey Statutes Annotated, Section 14:13-4 to 14:13-6).

Heinz), and others charging them with converting and destroying certain corporate assets belonging to the stockholders of the petitioner corporation (Tr. 1-13). Petitioners' claim against Heinz turns, in part, upon a prior decree which the corporation and its president Charles H. Owens (hereinafter usually called Owens) had obtained against Heinz in the Superior Court of the State of California (Tr. 7). Petitioners charge that Heinz participated in the destruction of an injunction awarded to both Owens and the corporation in that decree and in the conversion of certain patent rights which were the chief protective function of that injunction.

On November 16, 1943, Owens and the corporation brought the prior state court action against Heinz asking for declaratory and injunctive relief. They claimed that Owens was the owner of a patent for a vinegar generator which was licensed exclusively to the corporation, and charged that Heinz had by fraud obtained a license from Owens to use the patent. They asked for a declaration that the license from Owens to Heinz was invalid and unenforcible together with a further declaration that Heinz should be restrained from asserting any claims under the license or from constructing or maintaining any generators of the type covered by the Owens patent (Tr. 22-32).

On December 18, 1944, and after a 5-day trial, the state court entered its findings of fact and conclusions of law (Tr. 207-226, printed Appendix B-1). That court found that the license from Owens to Heinz was obtained by fraud upon both Owens and the corporation and ordered the license to be destroyed and cancelled. The state court further determined:

> "Plaintiffs Charles H. Owens and Owens Generator Company, Inc. are entitled to a decree of this court perpetually enjoining defendant H. J. Heinz Company and its officers, agents and representatives from asserting any rights or claims based upon said original document of November 25, 1941, or any copy thereof, *and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent of the United*

Jurisdiction of the DISTRICT COURT is based upon diversity of citizenship and sufficient amount in controversy.

States owned by plaintiff Charles H. Owens, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California." (Conclusion of Law VII, Tr. 225-226, Appendix B-1; emphasis added).

On December 21, 1944, the state court entered its decree which, among other things, incorporated verbatim the foregoing injunctive provision (Tr. 32-34, printed Appendix B-2). No appeal was taken and that judgment became and is final [*H. J. Heinz Co. v. Superior Court* (1954), 42 C. 2d 164, at page 167].

On February 10, 1950, Heinz brought a motion to modify the 1944 injunction and decree by deleting the words which are italicized in the foregoing quotation (Tr. 37). Heinz addressed that motion "To Charles H. Owens and the Owens Generator Company, Inc., the plaintiffs herein, and to Morris Lowenthal, their attorney."[2] That inter partes motion was denied on February 14, 1950 (Tr. 37). No appeal was taken and the order became and is final.

On May 17, 1954 Heinz and Owens made a joint motion to vacate, annul and set aside, *nunc pro tunc* as of December 21, 1944, the injunctive provisions of the judgment (Tr. 261-263), and on the same day the Superior Court entered an order accordingly (Tr. 268-269).[3] Heinz prepared the moving papers and the order itself (Tr. 264-267). But, as distinguished from its 1950 motion, Heinz made the 1954 motion ex parte as to the corporation. No pretense is made that any notice that the order was to be sought was given to the stockholders or directors of the corpora-

2. The motion itself was before the Court of Appeals and is before this Court as Exhibit C attached to Petitioners' Motion and Notice of Motion Regarding Judicial Notice filed in the Court of Appeals on December 27, 1962.

3. This motion followed the entry of an order by Mr. Justice Douglas on March 4, 1954 staying the execution and enforcement of the judgment of the Supreme Court of California in the case of *H. J. Heinz Co. v. Superior Court* (1954), 42 C. 2d 164, pending the filing and disposition of a petition for writ of certiorari.

tion other than Owens.[4] The order was based upon the representation to the state court "that the license from plaintiff Charles H. Owens to Owens Generator Company, Inc. was terminated in 1945 and said Owens Generator Company, Inc. has not had any interest in any of said patents since then, as found by this Court in that certain 'Interlocutory Order' of July 13, 1951" (Tr. 263).

Learning of this destruction of the injunction, ex parte as to them, and of the transfer of the patent rights which were the chief protective function of the injunction, petitioners brought the present action.

On motion of Heinz, the District Court found that the corporation ceased to have any interest in the patents as of January 19, 1943 (Tr. 312), and entered summary judgment dismissing the complaint as to Heinz (Tr. 316-317). The Court of Appeals, per curiam, also found that "the corporation's interest in the patents had terminated prior to the issuance of the injunction" and affirmed (Appendix A-1).

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4. Heinz admits that it never notified any of the petitioners that the order of May 17, 1954 was to be sought or that the order had been made (Answer, paragraph 31, Tr. 153; Cf. Complaint, paragraph 36, Tr. 9-10). No pretense is made that anyone else did so. Yet Heinz made it appear to the state court "that plaintiffs have stipulated thereto" (Tr. 269).

5. There is no pretense in this record that the written license was in fact or in law terminated in 1945. Heinz admits that "the recital in the Interlocutory Order of July 31, 1951 that the license from Owens to the Generator Company was terminated in 1945 was erroneous", but alleges that such license had in fact been terminated prior to 1945, namely, on November 25, 1941, "and in any event, no later than January, 1943" (Answer, paragraph 30, Tr. 153). The initial finding that "said exclusive license was fully terminated and cancelled during the year 1945" (Tr. 38), thus vouched for by Heinz was prepared by Morris Lowenthal as attorney only for Owens (Tr. 35), and he appeared only for Owens at the hearing (Tr. 36). Heinz admits that it did not notify any of the petitioners that any order of the Superior Court had ever determined that the exclusive license of the corporation was fully terminated and cancelled (Complaint, paragraph 36, Tr. 9-10; Answer, paragraph 31, Tr. 153). There is no suggestion that anyone else did so. And in its brief before the Court of Appeals, Heinz conceded (page 28, footnote 17), "Since the Generator Company was not a party to the contempt proceedings, nothing therein is *res judicata* as between it and Heinz. . . . The federal courts in the case at bar quite properly did not accept the representation made to the state court or the ex parte adjudication based thereon.

Petitioners sought rehearing asserting that it was improper to look behind the state court decree (Appendix A-3). The Court of Appeals, also per curiam, summarily denied the petition with the change of certain language in its opinion (Appendix A-4).[6]

REASONS FOR ALLOWANCE OF THE WRIT

The Congress, by the Act of May 26, 1790 (1 Stats. 122), as now codified in U.S. Code, Title 28, Section 1738, provided that judicial proceedings of any court of any State of the United States "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken." Ever since *Mills v. Duryee* (1813), 7 Cranch (11 U.S.) 481, the federal courts have consistently applied this statute to state court proceedings.[7] This Court there said that the act "declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision." (7 Cranch 485). This Court later said, "The faith and credit given is not to be niggardly but generous, full." [*Johnson v. Muelberger* (1951), 340 U.S. 581, at page 584].

1. The state court, in December 1944, found that Owens and the corporation "are entitled to a decree of this court perpetually enjoining" Heinz from claiming the right or license to build, maintain, or operate vinegar generators of the type cov-

6. The Court of Appeals changed the language "Any interest the corporation may have had in the injunction would seem to us to attach only to that decree's declaration that the corporation had never made an oral agreement to give Heinz the right to build generators" so that it would read "Any interest the corporation may have had in the injunction would seem to us to attach only to that decree's declaration that the parties (including the corporation) were not bound to Heinz by any agreement granting rights to build generators." Significantly, the decree of the state court does not so delimit the rights of the corporation in the perpetual injunction specifically awarded to both plaintiffs.

7. Illustrative authorities include *American Surety Co. v. Baldwin* (1932) 287 U.S. 156; *Milwaukee County v. White Co.* (1935), 296 U.S. 268; *Davis v. Davis* (1938), 305 U.S. 32; and *Huron Corp. v. Lincoln Co.* (1941), 312 U.S. 183.

ered by the Owens patent. The Court of Appeals looked behind that 1944 decree and made the contrary and independent determination that "Since the corporation's interest in the patents had terminated prior to issuance of the injunction, we can find no interest on the part of the corporation in the protection of the patent rights, which was the chief protective function of the injunction. . . ."

The Court of Appeals cited no authority permitting it thus to look behind the state court decree and to cast aside the contrary determination of that court. Clearly, the Court of Appeals did not give *any* faith and credit to the state court decree. In failing to give "full faith and credit", the decision is in conflict with U.S. Code, Title 28, Section 1738.

2. As stated above, the Court of Appeals cited no authority warranting a look-behind the state court decree. In effect, the Court of Appeals ignored the state court decree and defined the rights of the parties as if they were before a court of first instance. There is here more than the ordinary contention that the courts below failed to apply the rule of *Erie R. Co. v. Tompkins* (1938), 304 U.S. 64; and U.S. Code, Title 28, Section 1652. Here U.S. Code, Title 28, Section 1738 requires that a state court decree must be construed in accordance with the "law and usage" of the state from which the decree was taken. The courts below found no authority permitting the revamping of a state court decree on the ground that one of two co-plaintiffs was not entitled to the state court decree in the first place. The procedure followed below conflicts with that rule of statutory application set forth in *Mills v. Duryee* (1813), 7 Cranch (11 U.S.), 481 at page 484:

> "It remains only then to inquire, in every case, what is the effect of a judgment in the state where it is rendered? * * *"

Here there are no uncharted waters which made difficult or burdensome an inquiry as to the law and usage of the State of California. The law and usage, though sparse, are clearly stated in the cases and statutes.

Collins v. Butler (1859), 14 Cal. 223 is the only reported decision which any of the parties has found in which any judg-

ment obligor sought to show that a joint judgment was really owned by only one of the joint judgment obligees. In that case, two partners were judgment creditors. The judgment debtor, for the purposes of obtaining an equitable setoff against one of the partners, urged that the judgment "is, and was when obtained, really owned by E. J. Butler" (14 Cal. 227), the one of the two partners. The court held that the judgment debtor was estopped to urge that the judgment was not a joint judgment.

The same principle is applied in *Magshall v. Shafter* (1867), 32 Cal. 176. There the court, in speaking of a prior action in equity to set aside a certain deed, held, page 199:

> "... it must have been found that the plaintiffs in that action held the title, otherwise there would have been no basis for the judgment that the deed ... was null and void..."

Although these cases are quite old, the common-sense rule which they establish is indelibly and broadly perpetuated in the California Code of Civil Procedure, §§ 378 and 1908, printed in Appendix D. As here directly pertinent, C.C.P. § 1908 provides in unmistakable terms that "In case of a judgment or order against a specific thing, ... or in respect to the personal, ... or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, ... or the condition or relation of the person."

The decision at bar conflicts with all known authorities. The court below cites no authority whatsoever—much less any which even suggests that the law or usage of the State of California permits a subsequent court to remodel an earlier decree. Petitioners submit that at the very minimum U. S. Code, Title 28, Section 1738 does not permit the subsequent court to decide virtually as a matter of first impression that the earlier court made an award to which a party was not entitled.

3. In looking behind the state court decree thus to destroy rights specifically awarded in the state court decree, the decision below conflicts with *City of Sacramento v. Foule* (1874), 21

Wall. (88 U.S.) 119, and *H. J. Heinz Co. v. Superior Court* (1954), 42 C. 2d 164.

In *City of Sacramento*, plaintiff brought an action in the United States Circuit Court and relied upon an earlier judgment entered in an action in a District Court of the State of California. Defendant urged that the state court judgment was erroneous. At page 123, this Court, without finding it necessary to mention U.S. Code, Title 28, Section 1738, held:

> "It is hardly necessary to say that the question of the original liability of the city on the bonds sued upon is not open here. If the city had any defense to make to them, it should have been made when suit was brought against it in the State court."

H. J. Heinz Co. determined that res judicata was applicable to the specific judgment thus rejected by the court below. That decision involved contempt proceedings which were ex parte as respects the corporation and which were brought by the corporation's once loyal co-plaintiff, Owens, to enforce the judgment for his own self-interest. As in the case at bar, Heinz urged a defense which could have been raised in the earlier proceedings. The opinion, page 176, upheld the Superior Court's order that:

> ". . . defendant had the opportunity to raise that issue in the action in which the injunction was obtained, and not having done so, it was res judicata."

Here Heinz could have raised the defense that "the corporation's interest in the patents had terminated prior to issuance of the injunction," in the injunction action.[8] Not having done so,

8. This defense was clearly within the issues before the state court. Heinz there denied "that any justiciable or actual controversy exists between Plaintiff Company and either defendants" (Tr. 238). That court decided that "A justiciable and actual controversy exists between plaintiffs and defendants relating to the legal rights, obligations and duties of the plaintiffs and defendant corporation concerning said defendants' right to build and operater vinegar generators of the type covered by said plaintiff's patent and particularly concerning the existence; contents, validity and enforcibility of the written instrument hereinabove set out in paragraph VI of these findings and a copy of which is attached to the complaint and marked Exhibit 'B', in the respects hereinafter alleged in paragraph IX of these findings."

this state court decree is res judicata under both California law and usage and the federal practice. Yet the Court of Appeals failed to give the decree any credit at all.

4. Petitioners urge that they are "entitled as a matter of right" to have the state court decree given effect in the federal courts [Cf. *Davis v. Davis* (1938) 305 U.S. 32, 43]. When federal courts fail to give full faith and credit to a state court decree, and when they ignore the usage of the courts of the state in which the earlier decree was rendered as well as the statutory law, plaintiff submits that there has been such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision [Rule 19, Section 1(b)]. This Court in a full faith and credit case said, "the issues involved are important to the orderly administration of justice in the relationship of state and federal courts" [*Huron Corp. v. Lincoln Co.* (1941), 312 U.S. 183, at page 187]. Stated otherwise, " . . . The federal purpose of the clause makes this Court, for both state and federal courts, the 'final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause.' " [*Johnson v. Muelberger* (1951) 340 U.S. 581, 585].

CONCLUSION

For the reasons stated above, petitioners pray that the writ of certiorari issue.

Respectfully submitted,

CARL HOPPE

Attorney for Petitioners

(Appendices Follow)

Appendix A-1

Opinion of the Court of Appeals for the Ninth Circuit filed on January 23, 1963 in Docket No. 17,511 entitled Owens Generator Company, Inc., et al, Appellants, v. H. J. Heinz Company, Appellee.

United States Court of Appeals for the Ninth Circuit

No. 17,511—Jan. 23, 1963

Owens Generator Company, Inc., a defunct New Jersey corporation, et al.,
Appellants,

vs.

H. J. Heinz Company, a Pennsylvania corporation,
Appellee.

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: MERRILL and BROWNING, Circuit Judges, and TAYLOR, District Judge

PER CURIAM

We agree with the district court that the Generator Company's rights of license or ownership of the patents as against Owens had terminated pursuant to the terms of the agreement creating those rights and that Owens was the sole owner of the patents at the time of his settlement with Heinz.

We are not impressed with the contentions of appellants that notwithstanding the terms of the agreement the judgment of the California Superior Court constituted res judicata of this issue in

their favor. The rights of Owens and of the corporation as against each other were not in issue there. The issue was whether the agreements secured from those parties by Heinz were valid. Consequently, that judgment did not by virtue of law create license or ownership rights in the corporation greater in extent than the rights created by its agreement with Owens.

Since the corporation's interest in the patents had terminated prior to issuance of the injunction, we can find no interest on the part of the corporation in the protection of the patent rights, which was the chief protective function of the injunction. Any interest the corporation may have had in the injunction would seem to us to attach only to that decree's declaration that the corporation had never made an oral agreement to give Heinz the right to build generators.

It was therefore proper for Heinz to deal directly and solely with Owens with reference to the subject-matter of its agreement of settlement.

If upon equitable grounds the corporation had rights against Owens to share in Owens' settlement with Heinz, there is no evidence that Heinz had notice of such matters and appellant's remedy is against Owens.

Judgment affirmed.

(Endorsed) Per Curiam Opinion Filed Jan. 23, 1963.

Frank H. Schmid, Clerk.

Appendix A-2

Judgment of the United States Court of Appeals for the Ninth Circuit entered on January 23, 1963 in foregoing Appeal No. 17,511. Caption omitted.

JUDGMENT

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Appendix A-3

Appellants' Petition for Rehearing filed in the foregoing Appeal No. 17,511 on February 18, 1963. Caption omitted.

Appellants' Petition for Rehearing

Most respectfully, appellants ask this Court to grant this petition for rehearing[1] and to consider in further depth appellants' contention that "the Alameda proceedings are conclusive in the United States Courts" as urged on page 34 of their opening brief.

The Congress, in United States Code, Title 28, Section 1738, has provided that judicial proceedings of any court of any State of the United States "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken." Ever since *Mills v. Duryee* (1813), 7 Cranch. (11 U.S.) 481, the federal courts have consistently applied this statute to state court proceedings.[2] The Supreme Court has said, "The faith and credit given is not to be niggardly but generous, full." (*Johnson v. Muelberger* (1951), 340 U.S. 581 at page 584, citing *Davis v. Davis* (1938), 305 U.S. 32, 40).

Most respectfully, appellants submit that this Court has failed, in several respects, to give such full faith and credit to the state court proceedings.

---

1. This petition is based upon Rule 23 of the Rules of this Court and *Grant Paper Box Co. v. Russell Box Co.* (1st Cir. 1946), 154 F.2d 729, at page 730.

2. Illustrative authorities include *American Surety Co. v. Baldwin* (1932), 287 U.S. 156, 166; *Milwaukee County v. White Co.* (1935), 296 U.S. 268; *Davis v. Davis* (1938), 305 U.S. 32, 39, 43; *Huron Corp. v. Lincoln Co.* (1941), 312 U.S. 183, 193, 194; and *Scott Publishing Company v. Rodgers* (9th Cir. 1956), 229 F.2d 956, 957. *Pennington v. Gibson* (1853), 16 How. (57 U.S.) 65; *City of Sacramento v. Foulk* (1874), 21 Wall. (88 U.S.) 119, 123; and *Napa Valley Co. v. R. R. Comm.* (1920), 251 U.S. 366, are in accord but do not mention the statute.

1. This Court has determined:

> "Since the corporation's interest in the patents had terminated prior to issuance of the injunction, we can find no interest on the part of the corporation in the protection of the patent rights, which was the chief protective function of the injunction. . . ."

The Alameda court, on the other hand, found such an interest when it specifically and unequivocally adjudicated a perpetual continuing interest on the part of the corporation:

> "Plaintiffs Charles H. Owens *and* Owens Generator Company, Inc. are entitled to a decree of this court perpetually enjoining defendant H. J. Heinz Company and its officers, agents and representatives from asserting any rights or claims based upon said original document of November 25, 1941, or any copy thereof, and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent of the United States owned by plaintiff Charles H. Owens, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California." (Conclusion of Law VII, Tr. 225-226, emphasis added.)

and entered judgment accordingly.

Under the controlling California case law, a plural judgment is conclusive of a plural right to recover. This rule of decision is explicit in *Collins v. Butler* (1859), 14 Cal. 223, and is implicit in *Estate of Ross* (1919), 180 Cal. 651, at page 657; *Riverside Land etc. Co. v. Jensen* (1895), 108 Cal. 146, at page 147; *Haggin v. Clark* (1886), 71 Cal. 444, at page 452; *Marshall v. Shafter* (1867), 32 Cal. 176; and *State of California v. McGlynn* (1862), 20 Cal. 233; Heinz has cited no contrary authority. Counsel for appellants have made an extensive search and have found none. Indeed, C.C.P. § 1908 precludes contrary authority.

Appellants submit that, under the rule of the state courts and the federal courts alike, Heinz should not be permitted to look behind that adjudication (*H. J. Heinz Co. v. Superior Court*

(1954), 42 C. 2d 164, at page 176, 266 P.2d 5, at page 12; *Collins v. Butler* (1859), 14 Cal. 223, at pages 228-229; and *City of Sacramento v. Fowle* (1874), 21 Wall. (88 U.S.) 119, at page 123).

2. This Court has narrowly determined the only issue in the Alameda proceedings to be:

> ". . . The rights of Owens and of the corporation as against each other were not in issue there. The issue was whether the agreements secured from those parties by Heinz were valid. . . ."

The Alameda court, on the other hand, more broadly found and included the additional issue here actually in dispute:

> "A justifiable and actual controversy exists between plaintiffs and defendants relating to the legal rights, obligations and duties of the plaintiffs and defendant corporation concerning said defendants' *right to build and operate vinegar generators of the type covered by said plaintiff's patent* and particularly concerning the existence, contents, validity and enforcibility of the written instrument hereinabove set out in paragraph VI of these findings and a copy of which is attached to the complaint and marked Exhibit 'B,' in the respects hereinafter alleged in paragraph IX of these findings." (Finding VIII, Tr. 216, emphasis added).

The Alameda court defined the legal rights of both plaintiffs and the concurrent obligations and duties of Heinz. That court expressly and particularly found that *both* plaintiffs were entitled to a decree perpetually enjoining Heinz "from asserting or claiming *the right* or license *to build* or have built for itself or to maintain *or operate vinegar generators of the type*, kind or character *covered by any Letters Patent* of the United States *owned by plaintiff* Charles H. Owens, . . ." (Conclusion of Law VII, Tr. 225-226, emphasis added.)

Appellants ask this Court to note that the underscored language in Conclusion VII parallels, and expands upon, the underscored language of Finding VIII and ties the two together. This determination embraces more than the simple issue of the validity of the

agreements. It, in addition, defines the continuing rights, obligations and duties of all the parties with respect to the generators.

Under statutory law, the Alameda court was required to give judgment "for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled." (C.C.P. § 378, Cf. C.C.P. § 578). There is a presumption that it fulfilled this duty (C.C.P. § 1908; and *Estate of Buckhantz* (1958), 159 C.A. 2d 635, 642, 649).

3. This Court has determined:

> ". . . Any interest the corporation may have had in the injunction would seem to us to attach only to that decree's declaration that the corporation had never made an oral agreement to give Heinz the right to build generators."

The Alameda court, on the other hand, did not even mention any oral agreement in the decree, much less limit, as this Court has done, the corporation's adjudicated right to the perpetual injunction. The Conclusions of Law, from which the decree was taken verbatim, do not *in any way* limit the corporation's right to the perpetual injunction (Tr. 225-226). Likewise, Findings of Fact I to X, upon which the Conclusions of Law and the decree were primarily based, make no reference to an oral agreement or the non-existence thereof (Tr. 208-218). The only place where this alleged oral agreement is even touched upon is in Finding XI, which relates exclusively to matters alleged in the answer of Heinz but rejected by the state court (Tr. 218-225). In section C of that Finding the court held there was no such agreement (Tr. 221-222).

The Alameda court awarded the perpetual injunction to both plaintiffs in 1944. The nonexistence of an oral agreement allegedly made in 1940, more than 4 years before the decree, was a mere incident which does not in any way conflict with, or limit, the relief actually awarded by that court (C.C.P. § 1911; and *Estate of Buckhantz* (1958), 159 C.A. 2d 635, 642, 647, 649).

Appellants submit that they have truly been deprived of the full faith and credit to which their judgment is entitled. Unless this Court's judgment is corrected, Heinz will have successfully main-

tained a collateral attack on a California judgment and shall thereby have set at naught a right of the corporation *expressly adjudicated* to exist.

Most respectfully, appellants submit that a grave injustice has been done and urge this Court to reverse its decision.

Certificate of Counsel

Carl Hoppe and James F. Mitchell, counsel for petitioners, certify that in their judgment the foregoing petition for rehearing is well-founded and that it is not interposed for delay.

CARL HOPPE,
JAMES F. MITCHELL,
Counsel for Petitioners

Appendix A-4

Order of Court of Appeals for the Ninth Circuit in No. 17,511 filed February 21, 1963. Caption omitted.

Upon Petition for Rehearing

Before: MERRILL and BROWNING, Circuit Judges, and TAYLOR, District Judge

Rehearing denied.

The petition has demonstrated that in one respect the language of the opinion may not be clear or accurate. It is ordered that the opinion be modified as follows:

Lines 7 and 8 of the third paragraph of the opinion (being lines 7 and 8 of page 2 of the slipsheet printing) are stricken and the following is substituted:

> "* * * parties (including the corporation) were not bound to Heinz by any agreement granting rights to build generators."

CHARLES M. MERRILL
JAMES R. BROWNING
Circuit Judges

FRED M. TAYLOR
District Judge

Appendix B-1

Findings of Fact and Conclusions of Law made by the Superior Court of the State of California, in and for the County of Alameda, in No. 175,935 on December 18, 1944.

In the Superior Court of the State of California, in and for the County of Alameda

No. 175935

Charles H. Owens and Owens Generator Company, Inc., a corporation,
Plaintiffs,
vs.
H. J. Heinz Company, a corporation, and Glen F. Mason,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action having come on regularly for trial before the Honorable A. J. Woolsey, Judge of the Superior Court, on September 14, 15, 18, 19 and 20, 1944, and Milton Marks and Morris Lowenthal appearing as attorneys for plaintiffs Charles H. Owens and Owens Generator Company, Inc., a corporation, and Snook and Chase appearing as attorneys for defendants H. J. Heinz Company, a corporation, and Glen F. Mason, and the Court having examined the proofs offered by the respective parties, and oral and documentary evidence having been introduced and the Court having considered the evidence and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

I.

Defendant H. J. Heinz Company is a corporation organized under and by virtue of the laws of the State of Pennsylvania and at all times referred to in the complaint filed by plaintiffs said

defendant was and now is doing and transacting business in the State of California and more particularly in the County of Alameda, State of California, and has its principal office in the County of Alameda.

At all times referred to in the complaint filed by plaintiffs defendant Glen F. Mason was and now is employed by defendant H. J. Heinz Company as its Pacific Coast Manager and at all times mentioned therein was and now is a resident of Berkeley, California.

II.

At all times referred to in the complaint filed by plaintiffs, plaintiff Charles H. Owens was and now is a resident of the County of Alameda, State of California.

III.

At all times referred to in the complaint filed by plaintiffs, plaintiff Owens Generator Company, Inc., was and now is a corporation, incorporated under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Hackensack, New Jersey, for the purpose of engaging in the business of the manufacture, sale and installation of vinegar generators. At all times mentioned in said complaint plaintiff Charles H. Owens was and now is the President of plaintiff Owens Generator Company, Inc., a corporation.

IV.

At all times mentioned in the complaint filed by plaintiffs, plaintiff Charles H. Owens was and now is the owner and holder of a certain patent covering the construction and operation of vinegar generators of a type conceived, invented, perfected and patented by him, which said patent is more particularly described as Letters Patent of the United States No. 2,089,412, granted August 10, 1937.

V.

During all of the year 1940 and the year 1941 plaintiff Owens Generator Company, Inc., by a written agreement between plaintiff Charles H. Owens and plaintiff Owens Generator Company, Inc., was the holder of the exclusive license to manufacture, sell, install and operate vinegar generators of the type covered by the said patent owned by plaintiff Charles H. Owens and more particularly described hereinabove in paragraph IV of these findings, and all improvements thereon. Under and pursuant to the aforesaid exclusive license, plaintiff Owens Generator Company, Inc., on or about the 28th day of August, 1940, made and entered into the following contract and agreement with defendant H. J. Heinz Company for the sale to defendant and installation at defendant's manufacturing plant at Berkeley, California, of one Giant type Owens generator, said type being the type covered by the said patent, including all tanks and equipment necessary to operate said generators.

"Owens Generator Company, Inc.
520 Peoples Trust Building
Hackensack, New Jersey

SHIP TO H. J. HEINZ CO.
2900 San Pablo Avenue
Berkeley, California

ROUTE VIA
BEST WAY

1. Giant type Owens Generator, to include all tanks and equipment necessary to operate, and complete installation of the generator, tanks, equipment, etc. Concrete foundation to be provided by you in accordance with sketch approved by us.

   You are to provide a man to start operation of the generator, who is to remain until it is producing 100 grain Vinegar on an average of 400 gallons per 24 hour day, and in addition will instruct our people in the proper operation of the generator so that they can run it themselves.

It is understood and agreed that when the generator is operating to our entire satisfaction, we will accept and pay for same, and it becomes our outright property.

H. J. Heinz Company is to provide the Distilled Vinegar and Malt Beer or wort necessary to start the operation of the generator.

$7,100.00 delivered and installed.
2% 10 days after acceptance by us

You guarantee all workmanship and material to be first-class.

by accepting this order, you agree to indemnify us against any claims and demands for infringements of patents covering the whole or any portion of the goods hereinabove enumerated, and or the method that is accomplished in the operation of the apparatus, and in the event suit shall be instituted for alleged infringements of any patent of patents applicable to said apparatus and or method, you agree, upon request from us, and upon notice of the institution of any infringement suit, to assume the defense of such suit at your own cost and expense in every respect, and to pay any and all damages and or costs assessed against us, and to hold us entirely harmless in respect thereof.

Generator and apparatus to be furnished under this agreement shall be identical with and similar to, in every respect, the Owens installation at the plant of the Frank Tea & Spice Company, Cincinnati, Ohio, and susceptible of operation in the same manner as the Frank installation is operated.

SHIPMENT: to be delivered, installed and operating within sixty (60) days.

H. J. Heinz Co.
Per E. P. Goetz

Subsequent to the execution of said contract plaintiff Owens Generator Company, Inc., constructed a generator of the character, specifications and type described in the aforesaid contract of sale and during or about the months of February and March, 1941, installed said generator in said defendant's manufacturing plant

at Berkeley, California. Thereafter and at all times mentioned herein the said generator has remained and does now remain at said manufacturing plant at Berkeley, California.

Said defendant on or about September 15, 1943, paid to plaintiffs the full amount of the purchase price agreed upon in the aforesaid contract.

VI.

Shortly prior to the 25th day of November, 1941, and while plaintiff Charles H. Owens was at defendant's manufacturing plant at Berkeley, California, defendant Glen F. Mason represented to said plaintiff that defendant H. J. Heinz Company desired plaintiff to execute a document which would assure defendant corporation, in the event that plaintiff should be killed by reason of some unforeseen accident, of protection against any claims of unlawful or unauthorized use and operation, in contravention of said plaintiff's patent rights, of the one generator installed by plaintiffs at said manufacturing plant in Berkeley. Thereupon, and relying upon the representation of said defendant Mason as to the nature, scope and legal effect of said document, plaintiff Charles H. Owens, in defendant's manufacturing plant in Berkeley, California, on November 25, 1941, signed and gave to said Mason a document which had been prepared by said defendant Mason, and plaintiff signed said document without reading it either before, during or after signing the same and plaintiff affixed his signature to said document in reliance upon defendant Mason's express representation to him that the document merely related and applied to and concerned the one generator installed at Berkeley, California, and merely authorized defendant H. J. Heinz Company to operate the said generator which was the subject of the aforesaid purchase agreement. Plaintiff Charles H. Owens at no time read said document but just prior to the signing of said document by said plaintiff said Mason purported to orally read to him portions of the document which portions as read by Mason to said plaintiff referred solely to the right of defendant corporation to ma[illegible] and operate the said one generator installed at Berkeley, California.

In fact, the actual document which had been prepared by defendant H. J. Heinz Company and which had been signed by said plaintiff Charles H. Owens on said 25th day of November, 1941, reads in words and figures as follows:

"WHEREAS, for and in consideration of the sum of Seven Thousand One Hundred Dollars ($7,100), I, Charles H. Owens, of North Arlington, New Jersey, built for the H. J. Heinz Company, a corporation of the Commonwealth of Pennsylvania, and installed at its plant at Berkeley, California, a vinegar generator,—and whereas it is the desire of said H. J. Heinz Company to acquire the right to build and operate such vinegar generators as it will:

NOW THEREFORE, in consideration of the premises, and in consideration of the sum of One ($1.00) to me in hand paid, I, the said Charles H. Owens, hereby grant to the said H. J. Heinz Company, its successors and assigns, and its subsidiaries, both in this and in other countries, license under Letters Patent of the United States, No. 2,089,412, granted August 10, 1937 (of which I am sole owner), and under such other letters patent of the United States and of other countries as I may own or may hereafter own, or acquire adequate right under, to maintain and operate the generator at Berkeley alluded to above; and to build or to have built for itself and to operate vinegar generators at will and situated where it will, without other or additional consideration.

IN TESTIMONY WHEREOF, I have hereto set my hand this 25th day of November, 1941.

(Signed) C. H. Owens (Seal)

Witness:
T. A. Rhorabough (signed)"

The original of the aforesaid document, containing the signature of plaintiff Charles H. Owens, at all times from and after the 25th day of November, 1941, remained in the possession of the defendant H. J. Heinz Company until the said document was delivered by said defendant into the custody of this Court during the course of the trial of the above entitled action and the said original document is now in the possession of the Court.

The aforesaid document was obtained by fraud and misrepresentation on the part of the defendants as to the contents, nature, scope and legal effect of the said document. At the time defendants presented the aforesaid document to plaintiff Charles H. Owens for his signature and at the time defendants obtained his signature to the aforesaid document, defendants knew that said document purported to grant to defendant H. J. Heinz Company a license to build or to have built for itself and to operate vinegar generators of the type covered by the said Letters Patent wherever it wished to do so without paying any consideration to plaintiffs or either of them, and defendants well knowing said fact falsely and fraudulently represented to said plaintiff Charles H. Owens that said document merely related and applied to the one generator installed by plaintiffs at Berkeley, California, and falsely and fraudulently induced said plaintiff Charles H. Owens to execute said document upon said false representation and plaintiff Charles H. Owens believed the representations of defendants and was induced thereby to sign said document and attached his signature thereto in reliance upon the representations set forth above.

At the time the aforesaid document was signed by plaintiff Charles H. Owens it was signed by said plaintiff without knowledge by him of the true nature, contents, scope and legal effect of the same and was signed solely because of the aforesaid misrepresentations by defendants. It was signed by plaintiff Charles H. Owens without any knowledge that said document contained any reference to the acquisition by defendant H. J. Heinz Company of the right to build and operate vinegar generators as it will or that it contained any reference to the granting of a license, under the Letters Patent owned by plaintiff Charles H. Owens, to build or have built for itself and to operate vinegar generators at will and situate where it will.

At no time did defendant Mason or defendant H. J. Heinz Company or any of its officers, agents or representatives give to plaintiffs or either of them the sum of $1.00 referred to in the aforesaid document or any other sum or any other consideration whatever, monetary or otherwise, for the right or license to build

or have built for itself or to operate vinegar generators of the type covered by the Letters Patent owned by plaintiff Charles H. Owens other than the one generator installed at Berkeley, California, and neither plaintiff Charles H. Owens or plaintiff Owens Generator Company, Inc. received any consideration of any kind or character for executing the said document and no consideration of any kind or character ever passed from the defendants for the signing and execution of the same.

At all times from the date of the execution of the aforesaid document and until the production of the original of said document in court during the trial of the aforesaid action, plaintiff Charles H. Owens believed that the only document he ever signed and delivered to defendant Mason or to defendant H. J. Heinz Company or to any of its agents merely authorized defendant H. J. Heinz Company to maintain and operate the one generator installed at Berkeley, California.

Plaintiff Owens Generator Company, Inc. had no knowledge of the signing of the aforesaid document by plaintiff Charles H. Owens at any time until approximately six months before the filing of the complaint in this action and at no time did plaintiff Owens Generator Company, Inc. authorize plaintiff Charles H. Owens as its president or otherwise to sign or execute said document or to enter into any agreement with defendant corporation or its officers, employees or agents concerning or relating to the construction, maintenance, and operation of vinegar generators other than the one generator covered by purchase agreement of August 28, 1940.

VII.

On or about the 5th day of April, 1943, in the course of a discussion relative to a dispute between plaintiffs and defendants with respect to the payment of the purchase price of Seven Thousand, One Hundred Dollars ($7,100) for the purchase of the vinegar generator described in the contract of August 28, 1940, defendant corporation through defendant Glen F. Mason, its Pacific Coast Manager, for the first time informed plaintiff Charles

H. Owens that the said document signed by him on the 25th day of November, 1941, purported to give defendant corporation a license to build or to have built for itself and to operate vinegar generators of the type covered by said plaintiff's patent wherever it wished to do so without purchasing the same from the Owens Generator Company, Inc. or from plaintiff Charles H. Owens and without paying any consideration to plaintiffs or either of them. At said time, to-wit, on the 5th day of April, 1943, said defendant Mason showed and delivered to plaintiff Charles H. Owens a document, a copy of which is attached to the complaint filed by plaintiffs and marked Exhibit "B", and said Mason at said time stated to said plaintiff that said document represented a true copy of the document signed by plaintiff on the said 25th day of November, 1941, and more particularly described in paragraph VI hereinabove in these findings.

Prior to said 5th day of April, 1943, plaintiffs were not aware and had no knowledge that defendant corporation claimed the right to build or to have built for itself or to operate vinegar generators of the type covered by plaintiff's said patent at will and situated wherever it desired without the consent of plaintiffs and without the payment of any consideration or compensation to plaintiffs, and at no time prior to said 5th day of April, 1943, did plaintiffs or either of them have any knowledge that defendants had in their possession any document or documents of any kind or character purporting to be signed by plaintiff Charles H. Owens or by anyone else and purporting to give to defendant corporation the license to build or to have built for itself and to operate such vinegar generators at will and situated wherever it desired without plaintiff's consent and without any consideration or compensation to plaintiffs or either of them.

Promptly upon being informed on the said 5th day of April, 1943, of defendants' claim with respect to the nature of the document signed on November 25, 1941, plaintiff Charles H. Owens immediately denied that the original or any copy of Exhibit "B" attached to the complaint was ever shown to or read to said plaintiff or, to his knowledge, was signed by him, and said plain-

tiff denied that he or plaintiff Owens Generator Company, Inc. had ever given to defendant corporation the license, or that defendant corporation had any right or license to build, maintain or operate any vinegar generator of the type covered by the Letters Patent owned by said plaintiff except the one vinegar generator sold by plaintiffs to said defendant and installed at Berkeley, California.

VIII.

A justiciable and actual controversy exists between plaintiffs and defendants relating to the legal rights, obligations and duties of the plaintiffs and defendant corporation concerning said defendants' right to build and operate vinegar generators of the type covered by said plaintiff's patent and particularly concerning the existence, contents, validity and enforcibility of the written instrument hereinabove set out in paragraph VI of these findings and a copy of which is attached to the complaint and marked Exhibit "B", in the respects hereinafter alleged in paragraph IX of these findings.

IX.

Prior to and at the time of the filing by plaintiffs of the complaint against defendants and at the time of the trial of this action defendants claimed to have in their possession the original of the document attached to the complaint and marked Exhibit "B", and more particularly described and set out in paragraph VI of these findings, and claimed that said original document was signed by plaintiff Charles H. Owens and was signed by him on the said 25th day of November, 1941, and that said original document gave and does now give to defendant corporation the right to build or to have built for itself and operate vinegar generators at will of the type covered by plaintiff's patent, and situated where it will without the consent of plaintiffs or either of them and without the payment of any consideration to plaintiffs or either of them.

Plaintiffs claimed that the original of the said document attached to the complaint and marked Exhibit "B", and more

particularly set out in paragraph VI of these findings, was signed by said plaintiff without knowledge by plaintiff of the nature, contents, scope and legal effect of the same and was signed solely because of the misrepresentation by defendant corporation through defendant Mason, its Pacific Coast Manager, that the document related and applied solely to the one generator installed at Berkeley, California. At said times plaintiffs further claimed that the original of said Exhibit "B" was signed by plaintiff Charles H. Owens without any knowledge that it contained any reference to the acquisition by defendant corporation of the right to build and operate vinegar generators as it will or contained any reference to the granting of a license under the Letters Patent owned by plaintiff Charles H. Owens to build or have built for itself and to operate vinegar generators at will and situate where it will. Plaintiffs further claimed that the said signature of plaintiff Charles H. Owens and the document to which the signature is affixed were obtained by defendants through fraud and misrepresentation and, further, that there was no consideration whatever for any license purportedly granted by said alleged document to defendant corporation to build, maintain or operate any generators under the Letters Patent owned by plaintiff Charles H. Owens. Plaintiffs further claimed that defendant corporation has no right or license whatever to build or to have built for itself or to maintain or operate any vinegar generators covered by the said Letters Patent owned by plaintiff Charles H. Owens other than the one generator installed at Berkeley, California, and more particularly described in paragraph V of these findings.

X.

Defendants have threatened and do now threaten to exercise the right and license which defendants maintain is purportedly granted by said November 25, 1941 document, more particularly described in paragraph VI of these findings, to defendant corporation and defendant corporation threatens to build or have built for itself and to operate vinegar generators of the type and

character covered by the Letters Patent owned by plaintiff Charles H. Owens, and said threats and said claim to a license to build said vinegar generators have caused and will continue to cause, unless said defendant is enjoined and restrained by order of this Court, irreparable damage to and depreciation in the value of the Letters Patent owned by plaintiff Charles H. Owens and the said threats and claims of defendant tend to cloud the right, title and use that the said plaintiff has in the said patent and to impair the market value thereof and to prevent the said plaintiff from handling and utilizing the same in the manner most to his interests as owner thereof.

XI.

With reference to the answer of defendants H. J. Heinz Company, a corporation, and Glen F. Mason to the complaint filed by plaintiffs, this Court finds with respect to said answer:

A.

Referring to paragraph VII of the answer to the first count, found on page 4 of said answer, it is not true that the vinegar generator installed by plaintiffs at the manufacturing plant of defendant company at Berkeley, California, and purchased by defendant H. J. Heinz Company under the contract of August 28, 1940, more particularly described in paragraph V of these findings, failed to meet the requirements of the said order of defendant company of August 28, 1940, and in this respect the Court finds that prior to the commencement of this action the said vinegar generator did produce 100 grain vinegar on an average of 400 gallons per 24 hour day and that said vinegar generator was accepted by defendant H. J. Heinz Company and payment in full was made to plaintiffs by said defendant company after accepting the same.

B.

Referring to paragraph VIII of said answer, appearing on pages 5 and 6 thereof, it is not true that plaintiff Owens Generator Company failed to provide a man to operate the generator until it was

producing 100 grain vinegar on an average of 400 gallons per 24 hour day and it is not true that said company failed to provide a man to instruct employees of the H. J. Heinz Company in the satisfactory operation of the said generator. This Court further finds that it is not true that the generator has failed to operate to the entire staisfaction of defendant company. This Court further finds that the generator installed at the Berkeley, California, plant of defendant H. J. Heinz Company is constructed so as to be substantially identical in form and shape with and susceptible of operation in the same manner as the Owens Generator installed at the plant of the Frank Tea & Spice Company of Cincinnati, Ohio. This Court further finds that it is true that the generator sold by plaintiffs to defendant H. J. Heinz Company was not delivered, installed and operating within sixty days after said order of August 28, 1940, was signed and given by defendant company and was accepted by the Owens Generator Company, Inc. but this Court finds that defendant H. J. Heinz Company expressly waived the requirement that the generator be delivered, installed and operating within said sixty days and this Court further finds that with respect to all the terms and conditions of the order and contract of August 28, 1940, any and all breaches or violations thereof by plaintiffs were waived and renounced by the acceptance by defendant H. J. Heinz Company of the said generator and by the payment by said defendant company of the full purchase price for the same after full knowledge of the breaches of contract, if any, which had occurred.

This Court further finds that it is not true that when the payment of the total sum of $7100 on the part of defendant H. J. Heinz Company was completed on September 15, 1943, by payment of the balance thereof in the sum of $5,636.32, the said sum was paid by defendant company to and was accepted by plaintiffs on any agreement or on any understanding that they had with defendants, or with either of them, that said payment constituted any consideration, in part or otherwise, for the license claimed by defendant H. J. Heinz Company under and by virtue of the document of November 25, 1941, more particularly set

out in paragraph VI of these findings, and to the contrary this Court finds that the payment of the purchase price, and particularly the payment of the balance of the purchase price, was paid by defendant company and was accepted by plaintiffs on the express agreement and understanding between the parties that the said payment and the acceptance of the same would in no way whatever constitute any consideration, in part or otherwise, for the agreement of November 25, 1941, and would in no way jeopardize, alter, waive, modify or adversely affect the position of either party with respect to the contentions of each party as to the validity and enforcibility of the said document of November 25, 1941.

C.

With respect to paragraph X of the answer to the first count of plaintiffs' complaint, found on pages 6 to 7 of said answer and to paragraph V of the affirmative defense and answer to the complaint, found on page 16 of said answer, this Court finds that it is not true that prior to August 25, 1940, or at any time prior to the time that the order or contract of August 28, 1940, was given to plaintiff Owens Generator Company, Inc. by defendant H. J. Heinz Company had plaintiffs or either of them ever offered to grant to defendant H. J. Heinz Company a license under the Letters Patent owned by Charles H. Owens, or under any other letters patent, the right to build or to have built for itself or to operate vinegar generators at will and situate where it will without other or additional consideration to plaintiffs or either of them. This Court finds that it is not true that in soliciting the H. J. Heinz Company to enter into an agreement to purchase the generator referred to in the contract of August 28, 1940, and more particularly described in paragraph V of these findings, plaintiffs held out or offered any such license as additional inducement or otherwise for the making of the said contract. This Court further finds that it is not true that through inadvertence or mistake the aforesaid license was not executed at the time of or before said order of August 28, 1940, was given

for the purchase of a generator, but on the contrary this Court finds that no such license, at any time before or at the time of the giving of said order or the making of said contract of August 28, 1940, was contemplated by any of the parties to the contract or by any of the parties to this action. This Court further finds that the document of November 25, 1941, more particularly described in paragraph VI of these findings, was not executed in compliance with or in fulfillment of any agreement theretofore existing between the parties and was not executed for any consideration whatever.

D.

With respect to paragraphs XI and XII of the answer to the first count, found on page 8 of the answer, this Court finds that it is not true that at the time defendant Mason read to plaintiff Charles H. Owens the document of November 25, 1941, more particularly described in paragraph VI of these findings, said Owens understood the said document and that the said Owens verbally discussed any part of the same with defendant Mason.

E.

With respect to paragraph III of the affirmative defense and answer to the complaint, found on page 15 of said answer, this Court finds that plaintiff Owens Generator Company, Inc. has had and does now have legal capacity to sue and to file this action.

F.

With respect to paragraphs XI and XII of the affirmative defense and answer to plaintiff's complaint, appearing at pages 19 and 20 of the answer, this Court finds that it is not true that the words, meaning, intent, purpose, import or legal effect of the document of November 25, 1941, more particularly described in paragraph VI of these findings, was ever called to the attention of plaintiffs or either of them on any occasion prior to April 5, 1943. This Court further finds that it is not true that plaintiffs

accepted the payment in full of the purchase price of $7100 for the purchase of the one generator installed in Berkeley, California, with any reservation, mental or otherwise, or with any intention to harass defendants by filing this action or otherwise, for the purpose of making any settlement with defendants or either of them or for any other purpose except to lawfully and properly obtain judicial adjudication of the invalidity and unenforcibility of the said document of November 25, 1941, and it is not true that plaintiffs commenced or prosecuted this action for any purpose of harassing defendants or with any fraudulent plan or purpose as claimed by defendants, and it is not true that in so commencing and prosecuting this action plaintiffs knew that their claims with respect to said document of November 25, 1941, were groundless and were without foundation in law or fact but to the contrary the plaintiffs knew and this Court so finds, that said claims of plaintiffs that defendant had obtained said document of November 25, 1941, through fraud and misrepresentation, were justified and had ample foundation both in law and in fact.

G.

With respect to paragatph XIII of the affirmative defense and answer to plaintiff's complaint, found on page 20 of said answer, this Court finds that it is not true that plaintiffs or either of them are estopped or prevented, in law or in fact, from contending or proving that plaintiff Charles H. Owens did not read or understand the meaning, intent, purpose, import or legal effect of the document of November 25, 1941, or from contending or proving that said document was without consideration or from contending or proving that said plaintiff's signature on said document was obtained by fraud and misrepresentation.

CONCLUSIONS OF LAW

I.

Plaintiff Owens Generator Company, Inc. has legal capacity to sue.

II.

Defendant H. J. Heinz Company has no right or license to build or have built for itself or to maintain or to operate vinegar generators of the type, kind or character covered by the Letters Patent of the United States owned by plaintiff Charles H. Owens, more particularly described as Letters Patent of the United States, No. 2,089,412 granted August 10, 1937, and Letters Patent of the United States No. 2,236,153, granted March 25, 1941, or any other improvements thereon, or under any other letters patent that said Charles H. Owens may hereafter own or acquire with respect to the operation of vinegar generators or with respect to any other thing.

III.

That the following document dated November 25, 1941, and which document is more particularly described in paragraph VI of these findings and a copy of which is attached to the complaint as Exhibit "B", was obtained by fraud and misrepresentation on the part of defendant H. J. Heinz Company as to the contents, nature, scope and legal effect of the said document and the same is void and unenforcible:

[We here omit the text of the document which is identical with the text in Finding VI above.]

IV.

At no time did defendant H. J. Heinz Company give nor did plaintiff Charles H. Owens or Owens Generator Company, Inc. receive any consideration, monetary or otherwise, for the execution of the document of November 25, 1941, and there was no consideration for the execution of the same and the said document is void and unenforcible.

V.

The plaintiffs are not estopped or prevented or precluded in law or in fact from relying upon, contending or proving that

plaintiff Charles H. Owens did not read or understand the meaning, intent, purpose, import or legal effect of the document of November 25, 1941, or from contending or proving that said document was without consideration or from contending or proving that said document was obtained by fraud and misrepresentation.

VI.

Plaintiffs Charles H. Owens, and Owens Generator Company Inc., a corporation, are entitled to a decree of this court ordering defendants to deliver up to this court the original of said document of November 25, 1941, and ordering the said original destroyed and cancelled.

VII.

Plaintiffs Charles H. Owens and Owens Generator Company Inc. are entitled to a decree of this court perpetually enjoining defendant H. J. Heinz Company and its officers, agents and representatives from asserting any rights or claims based upon said original document of November 25, 1941, or any copy thereof, and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent of the United States owned by plaintiff Charles H. Owens, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California.

VIII.

Plaintiffs Charles H. Owens and Owens Generator Company Inc. are entitled to recover from defendant H. J. Heinz Company their costs of suit.

Done in open court this 18th day of December, 1944.

/s A. J. WOOLSEY
Judge of the Superior Court

Appendix B-2

Judgment and Decree for Declaratory and Other Relief entered in the foregoing Civil Action No. 175,935 on December 21, 1944. Caption omitted.

JUDGMENT AND DECREE FOR DECLARATORY AND OTHER RELIEF

The above entitled action having come on regularly for trial before the Honorable A. J. Woolsey, Judge of the Superior Court, on September 14, 15, 18, 19 and 20, 1944, and Milton Marks and Morris Lowenthal appearing as attorneys for plaintiffs Charles H. Owens and Owens Generator Company, Inc., a corporation, and Snook and Chase appearing as attorneys for defendants H. J. Heinz Company, a corporation, and Glen F. Mason, and the Court having examined the proofs offered by the respective parties, and oral and documentary evidence having been introduced and the Court having considered the evidence and the cause having been submitted to the Court for its decision, and Findings of Fact and Conclusions of Law having been made and filed in this action on the 18th day of December, 1944, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that defendant H. J. Heinz Company has no right or license to build or have built for itself or to maintain or to operate vinegar generators of the type, kind or character covered by the Letters Patent of the United States owned by plaintiff Charles H. Owens; more particularly described as Letters Patent of the United States No. 2,089,412 granted August 10, 1937, and Letters Patent of the United States No. 2,236,153, granted March 25, 1941, or any other improvements thereon, or under any other letters patent that said Charles H. Owens may hereafter own or acquire with respect to the operation of vinegar generators or with respect to any other thing.

It Is Further Ordered, Adjudged and Decreed that the following document, dated November 25, 1941, which document is

more particularly described in paragraph VI of the Findings of Fact filed herein in this proceeding and a copy of which is attached to plaintiff's complaint as Exhibit B, was obtained without consideration and by fraud and misrepresentation on the part of defendant H. J. Heinz Company and is void and unenforceable:

"Whereas, for and in consideration of the sum of Seven Thousand, One Hundred Dollars ($7,100) I, Charles H. Owens, of North Arlington, New Jersey, built for H. J. Heinz Company, a corporation of the Commonwealth of Pennsylvania, and installed at its plant at Berkeley, California, a vinegar generator,— and whereas it is the desire of said H. J. Heinz Company to acquire the right to build and operate such vinegar generators as it will:

"Now Therefore, in consideration of the premises, and in consideration of the sum of One ($1.00) *Dollar* to me in hand paid, I, the said Charles H. Owens, hereby grant to the said H. J. Heinz Company, its successors and assigns, and its subsidiaries, both in this and in other countries, license under Letters Patent of the United States, No. 2,089,412, granted August 10, 1937 (of which I am sole owner), and under such other letters patent of the United States and of other countries as I may own or may hereafter own, or acquire adequate right under, to maintain and operate the generator at Berkeley alluded to above, and to build or to have built for itself and to operate vinegar generators at will, and situated where it will, without other or additional consideration.

"In Testimony Whereof, I have hereto set my hand this 25th day of November, 1941.

[Seal] s/ C. H. OWENS. [Seal]

Witness:

s/ T. A. RHORABOUGH"

It is Further Ordered, Adjudged and Decreed that defendant of the foregoing document of November 25, 1941, containing the original signature of Charles H. Owens, and which original

is now in the possession of this Court, shall be cancelled and destroyed by the Clerk of this Court.

It Is Further Ordered, Adjudged and Decreed that defendant H. J. Heinz Company and its officers, agents and representatives be and they hereby are perpetually restrained and enjoined and forever debarred from asserting any rights or claims based or founded upon or arising out of said original document of November 25, 1941 or any copy thereof, and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent of the United States owned by plaintiff Charles H. Owens, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California.

It Is Further Ordered, Adjudged and Decreed that plaintiffs Charles H. Owens and Owens Generator Company, Inc., do have and recover their costs incurred herein from defendant H. J. Heinz Company, $53.00.

Done in open court this 21st day of December, 1944.

A. J. WOOLSEY,
Judge of the Superior Court.

Appendix C

Order Granting Motion for Summary Judgment made on April 7, 1961 by the United States District Court for the Northern District of California, Southern Division, in Civil Action No. 36,558, brought by Owens Generator Company, Inc., et al, Plaintiffs, against H. J. Heinz Company, et al, Defendants. Caption omitted.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant H. J. Heinz Company, on June 13, 1960, filed its motion for summary judgment pursuant to F.R.C.P. 56(b). Oral argument on the motion was heard September 23, 1960, and memorandum in support and opposition were filed by the parties subsequently.

From a perusal of the pleadings, affidavits, depositions, answers to interrogatories, admissions, exhibits and the memoranda of counsel, it appears that the case is based upon a theory of constructive trust. It is plaintiff's claim that the Owens Generator Co., (hereinafter referred to as Generator Co.), owned certain assets, particularly two patents, and an injunction. The first patent, No. 2089412, was for a vinegar generator. It was obtained in the name of defendant Charles H. Owens, (hereinafter referred to as "Owens"), on August 10, 1937. The second patent, covering improvements to the generator, No. 2,236,153, was issued in Owens' name on March 25, 1941. The injunction was issued in 1954 and is noted, infra.

On March 10, 1938, the plaintiffs–Tobin and Wittmer and defendant Owens formed the Generator Company and contemporaneously with its formation defendant Owens executed an instrument in regard to the first patent, among other provisions thereof being the following:

> " * * * the sole and exclusive right, privilege, and license within the United States to manufacture, sell, install and operate vinegar generators containing the said patented improvement, and any and all improvements thereon, for

so long as said [Generator Company] shall continue in business, or to the end of the term for which the said letters patent, or any extensions thereof, were granted, whichever event shall first occur * * *."

Subsequently, Owens developed the second patent.

During the latter part of 1938 and the early part of 1939, the H. J. Heinz Company became interested in purchasing a vinegar generator from the Generator Co. A purchase was negotiated in 1939. In 1941, Heinz obtained from defendant Owens a written license to build other generators under the first Owens' patent. In 1943 suit was brought by defendant Owens and the Generator Co., to rescind and cancel the license of 1941. The action was instituted in the Superior Court of Alameda County (Civil No. 175935) and resulted in a judgment in their favor against defendant Heinz.

On September 8, 1949, Owens, with defendant Morris Lowenthal as his attorney, instituted civil contempt proceedings against Heinz in the Alameda Superior Court charging Heinz with violating an injunction issued in 1944 in the action by Owens and the Generator Co., against Heinz, which precluded Heinz from building any generators under the 1941 license. The Court therein found that Heinz had violated the injunction and issued an interlocutory order granting damages to Owens and ordering Heinz to destroy the generators built in violation of the injunction. Subsequently, the California Supreme Court annulled the contempt order insofar as it awarded damages but sustained it as to destruction of the generators. *Heinz Co. v. Superior Court*, 42 C. 2d 164 (1954).

Heinz then obtained a stay pending filing of petition for certiorari from Justice Douglas of the United States Supreme Court. Before filing the petition, the matter was settled.

On May 15, 1954, Owens assigned his entire interest in the first and second patents to Heinz and released Heinz from claims of violation of the injunction and from the effects of the contempt order.

The assignment recited that Owens "* * * by these presents does sell, assign, transfer and set over unto said H. J. Heinz Company, its successors and assigns, *the entire right, title and interest in and to*" the first and second patents * * *"

In settlement, Heinz paid to Owens $250,000.

On May 17, 1954, Owens and Heinz, in the California Superior Court action, brought a series of motions and obtained an order dissolving the 1944 injunction. (Civil No. 175935, May 17, 1954, Motion to dissolve Injunction and Modify Judgment, Civil No. 175935—Order dissolving Injunction and Modifying Final Judgment. Exhibit "C" to plaintiff's op. brief).

Plaintiffs now seek to impose a constructive trust on "profits" held by Heinz derived from the May, 1954 transaction. (Plaintiff's op. brief, pg. 39). It is plaintiff's contention that Heinz acted with full knowledge of the Generator Co.'s interest in the patents and of a breach of fiduciary relationship between defendant Owens and the Generator Co.

The only interest the Generator Co. ever had in the first patent is evidenced by the agreement from which the quotation above is taken. Plaintiff contends that the construction and operative effect of the above provision and the occurrence of the event which it contemplates are fact issues which cannot be determined on this motion. However, there appears nowhere in the material before the Court any genuine material issue of fact in regard to the agreement in dispute. Whether it is termed a "grant" a "license" or an "assignment" does not change the legal effect of its provisions, and it is clearly within the province of the Court to determine the legal effect in a motion under F.R.C.P. 56(b). The contract here is unambiguous, and in construing the provision no issue of material fact appears to bear on the resolvement. *Simpson Bros. v. District of Columbia*, 179 F.2d 430 (Cal. D.C. 1949) cert. den. 338 U.S. 911 (1950).

We only decide on this motion the effect of the provision of the agreement as to Heinz.

In this posture, it is clear that the construction of the agreement is a question of law. *Fox v. Johnson and Wimsatt*, 127 F.2d 729, 736 (Cal. D.C. 1942).

Whether defendant Owens had waived rights under the agreement or otherwise acted to change the application of the provisions as to him does not concern the Court here. If the agreement is construed as a license to the Generator Co., it is well settled that it would terminate when the Generator Co. ceased to exist legally. A patent licensing contract is personal to the licensee and terminates with the life of the licensee. Thus when the corporation ceased to exist, so did the license. *Haffcke v. Clark*, 50 F. 531, 536 (CCA 4, 1892); *Kenyon v. Automatic Instrument Co.*, 63 F. Supp. 591 (D.C. Mich. 1945).

Construing the agreement as an assignment of the legal ownership of the patent, the words of the assignment control: "For so long as said (Generator Co.) shall continue in business." The agreement, as it stands written, ceased automatically by operation of law when the events upon which it is conditioned came to pass. *Pierpoint Boiler Co. v. Penn. Iron & Coal Co.*, 75 F. 289 (N.D. Ohio E.D. 1896).

When the Attorney General of New Jersey enjoined the company from transacting any business by order of November 25, 1941, (Exhibit I to Lowenthal-Owens answer and complaint), the company ceased to have an interest in the patent insofar as the plain words of the agreement are concerned. Assuming that the Generator Co. could transact some business in the way of winding up between November 25, 1941 and January 19, 1943, it is undisputed that on the latter date it ceased to have any existence at all for any purpose, for on that date the charter of the company was revoked by the Governor of New Jersey. (Lowenthal-Owens Answer, pg. 29, lines 21-27).

Therefore, as to defendant Heinz, any dealings with Owens in relation to the first patent would, and properly could, be carried out in good faith and belief that Owens was the sole owner thereof.

It is not clear from the pleadings whether the second patent was in fact transferred to the Generator Co. It was issued on March 25, 1941, three years subsequent to the agreement in question and no recording in the patent office of an agreement relating to the patent exists. (Admission to Heinz Interrog. 34). If, however,

Owens gave any grant or assignment of the second patent to the Generator Co., under the 1938 agreement, it came to an end for the very same reasons as patent No. 1. Aside from this, the patent stands in the name of Chas. Owens alone. Plaintiffs contend that they have an interest in the patent because they financed its development. Whatever the merits of this claim, it does not affect Heinz' good faith dealing with Owens.

The Alameda Court determined in its judgment in 1944 (supra) that Owens was the owner of the patents. The patents stood in the name of Owens alone. All evidence of record showed it to be Owens' patent.

At all stages of the proceedings in the 1944 action, the Generator Co. was a party. It was represented by counsel, Morris Lowenthal, defendant herein. All stages of the 1954 settlement and vacation of the injunction were on the record and Owens was also represented by Mr. Lowenthal.

There is no dispute as to the material facts affecting Heinz' dealings. From the facts as adduced, the Court finds that Heinz proceeded properly and as a matter of law we would not impose a trust on defendant Heinz.

In addition, the matter of ownership of the patents is settled by the 1944 Alameda suit and is res judicata as to the Generator Co. The judgment recites (Findings of Fact and Conclusions of Law IV) that Chas. Owens is the owner of patent No. 1. The pleadings put in issue the ownership of patent No. 2 and no adjudication finding the Generator Co. as owner of it resulted therefrom. Heinz was an adverse party to Owens and the Generator Co. in that suit.

Therefore, ownership is determined in the prior action and binds the Generator Co. now. *Johnson v. Fontana County F.I. District*, 15 C. 2d 380; 2 *Freeman on Judgments*, Sec. 689.

"A former adjudication between the same parties may be either a final determination of the right of the parties or may be an adjudication of certain questions of fact which have been put in issue and decided." *People v. Bailey*, 30 Cal. App. 581 (1916)

Ownership having been adjudicated to be in Owens, Heinz could take, in good faith, absent notice of another interest, all Owens' right, title and interest in the patents. We do not decide here whether Owens, vis-a-vis the Generator Co., had waived rights under the license provisions or had acted in breach of duties owed to the Generator Co. We find no genuine issue of material fact as to Heinz' actions in respect to the patents.

On the question of notice to Heinz of an interest of the Generator Company in the injunction of 1944, no facts need be determined as this issue is purely a legal one.

On the question of destruction of a "property right" by Heinz in dissolving the 1944 injunction, as a matter of law it is clear that the injunction covered only patent rights.

> "It is Further Ordered, Adjudged and Decreed that defendant H. J. Heinz Company and its officers, agents and representatives be and they hereby are perpetually restrained and enjoined and forever debarred from asserting any rights or claims based or founded upon or arising out of said original document of November 25, 1941 or any copy thereof, and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent of the United States owned by plaintiff Charles H. Owens, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California."

As to Heinz' knowledge, these rights were owned by Owens alone and concerned patent rights only. This is the only "property right" involved in the Alameda County Superior Court action. Whether Owens, as a fiduciary of the Generator Co., breached any duty to the Company by his actions in the matter is of no consequence in this motion for summary judgment by Heinz. We are concerned only with Heinz' duties. From the foregoing, we find that there existed no facts on which to base a claim of knowledge on the part of Heinz of a breach of duty by Owens to the Company.

Because of the conclusions above the Court has not passed upon herein the further issues raised by Heinz concerning (1) laches and the statute of limitations (2) the lack of a "res" upon which to impose a constructive trust.

THEREFORE, IT IS ORDERED that defendant Heinz' motion for summary judgment under Rule 56(b) be granted and said defendant is hereby dismissed. Counsel for defendant Heinz to prepare judgment accordingly.

Dated: April 7th, 1961.

ALBERT C. WOLLENBERG
UNITED STATES DISTRICT JUDGE

Appendix D

Statutory Provisions Involved.

U.S. Code, Title 28, Section 1738:

"§ 1738. *State and Territorial statutes and judicial proceedings; full faith and credit.*

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

California Code of Civil Procedure, Section 378:

"§ 378. [*Who may be joined as plaintiffs.*] All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; provided, that, if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled. [Enacted 1872; Am. Stats. 1927, p. 631.]"

California Code of Civil Procedure, Section 1908:

"§ 1908. [*Effect of a judgment upon rights in various cases.*] The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding. [Enacted 1872; Am. Code Amdts. 1873-74, p. 582.]"